MAJOR COURT DECISIONS, 2005

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005)

Issue: Whether distributors of file sharing software may be held liable for acts of copyright infringement by third parties using that software.

Holding: A unanimous Court, per Justice Souter, held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement of third parties." *Grokster*, 125 S. Ct. at 2770, 162 L. Ed. 2d at 790. The finding of secondary liability was based on a theory of inducement and the Court declined to revisit its holding in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). The Court said the *Sony* decision only barred finding secondary liability by imputing intent to induce infringement by third parties. Where, as here, evidence of such intent exists, liability may found consistent with the *Sony* rule. Finding that there was ample evidence to support the claim of copyright infringement, the Court vacated the grant of summary judgment in favor of respondents Grokster.

Discussion: The Court found the evidence in the summary judgment to be "replete" with instances in which respondents "acted with a purpose to cause copyright violations by use of software suitable for illegal use." *Grokster*, 125 S. Ct. at 2781, 162 L. Ed. 2d at 802. First, respondents specifically targeted former Napster users after that file-sharing service was shut down by court order. Second, there was no evidence that respondents attempted to mitigate illegal use of their software. The Court disagreed with the Ninth Circuit's holding that a lack of an independent duty to monitor their users' activities exonerated respondents because, combined with other evidence of intent, it "underscores Grokster's and StreamCast's intentional facilitation of their users' infringement." *Id.* at 2781, 162 L. Ed. 2d at 802. Third, the Court noted that file-sharing companies make money from selling advertising and thus have an incentive to encourage high-volume use of their software, which encourages the infringement use the Court already identified. "[V]iewed in the context of the entire record," this fact strengthened the case against respondents. *Id.* at 2782, 162 L. Ed. 2d at 803.

Finally, the requirement of actual infringement under the inducement theory was clearly satisfied because "there [wa]s evidence of infringement on a gigantic scale." *Id.* at 2782, 162 L. Ed. 2d at 803. Thus, under the inducement theory, the Court found "[t]he unlawful objective" to be "unmistakable." *Id.* at

2782, 162 L. Ed. 2d at 803.

The Court emphasized that it had not used a theory of contributory or vicarious liability which would have attached liability to the distribution of a product capable of being used for illegal purposes. Liability was found here by "inferring a patently illegal objective from statements and actions showing what that objective was." *Id.* at 2782, 162 L. Ed. 2d at 803.

Justice Ginsburg, joined by Chief Justice Rehnquist and Justice Kennedy, concurred in the Court's holding, but wrote separately to explain why, under *Sony*, she believed "the evidence was insufficient to demonstrate, beyond genuine debate, a reasonable prospect that substantial or commercially significant noninfringing uses were likely to develop over time." *Id.* at 2786, 162 L. Ed. 2d at 808 (Ginsburg, J., concurring).

Justice Breyer, joined by Justices Stevens and O'Connor, also concurred in the Court's holding, but wrote separately to express his disagreement with Justice Ginsburg. He felt that summary judgment in favor of respondents was appropriate and believed "the record reveals a significant future market for noninfringing uses of Grokster-type peer-to-peer software." *Id.* at 2789, 162 L. Ed. 2d at 811 (Breyer, J., concurring). Then, Justice Breyer addressed what he called "the real question": whether the *Sony* standard should be modified. He rejected that suggestion and warned that Justice Ginsburg's approach would place a heavier burden on defendants and "undercut the protection that *Sony* now offers."

Summarized by Michael D. Magidson

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005)

Issue: Whether the Federal Communications Commission's ("FCC" of "Commission") classification of broadband cable modem service as an "information service" but not as a "telecommunications service" under Title II of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 ("Act"), which subjects all providers of "telecommunications service" to mandatory common-carrier regulation, is a lawful construction of the Telecommunications Act under *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984) and the Administrative Procedure Act (APA), 5 U.S.C. §§ 555 *et seq.*

Holding: The Court held that broadband cable modem companies are exempt from mandatory common-carrier regulation because the FCC's classification of cable modem service as an "information service" rather than a "telecommunications service" is a lawful construction of the Act under *Chevron* and the APA.

Description: The Ninth Circuit held that the FCC could not permissibly construe the Act to exempt cable companies providing Internet service from Title II regulation under *AT&T Corp. v. Portland*, 216 F.3d 871 (9th Cir. 2000), which held that cable modem service was a "telecommunications service." Nevertheless, the Supreme Court reversed the Ninth Circuit's decision because the *AT&T* court did not review an administrative proceeding and the FCC was not a party to the case. Thus, the Ninth Circuit erred by not applying *Chevron*, which governs the FCC's interpretation of the Act.

Under *Chevron's* framework, the FCC can "execute and enforce" as well as "prescribe such rules and regulations as may be necessary in public interest to carry out the provisions" of the Act. Ultimately, the FCC has the congressional authority to resolve statutory ambiguities in a reasonable fashion since it is better equipped to make different policies choices than the courts.

The FCC previously concluded that cable modem service is an "information service" because the service only uses the high-speed cable, or telecommunications, to provide consumers with a comprehensive capability for manipulating information and using the Internet rather than a "stand-alone, transparent offering" of such telecommunications. *In re* Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling*, 17 F.C.C.R. 4798 (March 14, 2002). The dissent argues that the high-speed transmission component necessary to providing cable modem service is necessarily "offered" with Internet service because cable modem service is like the offering of pizza delivery service together with pizza. However, the Court maintains that the dissent's argument only underscores the ambiguity of the term, "offer," and holds that so long as the FCC's construction is reasonable, the Commission may rely on its expert policy judgment to resolve the ambiguity. As such, the Court held that the FCC's conclusion that cable modem service does not offer the "transparent ability" to transmit information (from the consumer's perspective) is a reasonable construction.

Finally, the Court rejected MCI, Inc.'s argument that the FCC's treatment of cable modem services is inconsistent with its treatment of Digital Subscriber Line ("DSL") service and is therefore an arbitrary and capricious deviation from agency policy under the APA. The Court held that the FCC is free within the limits of reasoned interpretation to justify inconsistent treatment between cable modem service and DSL service. The Court expressed no further view regarding this matter and asserted that any inconsistency between the order under review and the FCC's treatment of DSL service will be adequately addressed when the FCC fully reconsiders the issue.

Summarized by George Wang

Am. Library Ass'n Inc. v. FCC, 406 F.3d 689 (D.C. Cir. 2005)

Issue: Whether Congress delegated authority to the Federal Communications Commission ("FCC" or "Commission") in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("Act"), to regulate an apparatus that can receive television broadcasts but the apparatus is itself not engaged in the process of receiving a broadcast transmission.

Holding: The U.S. Court of Appeals for the District of Columbia Circuit found that the Commission acted outside the scope of its delegated authority when it adopted regulations requiring digital television receivers and other devices capable of receiving digital television broadcast signals, manufactured on or after July 1, 2005, to include technology that would recognize "broadcast flags." The court found that the FCC never possessed ancillary jurisdiction under the Act, or subsequent congressional legislation, to regulate consumer electronic devices that can be used for receipt of wire or radio communication when the devices are not engaged in the process of radio or wire transmission. The Commission's Order was reversed and vacated insofar as it requires demodulator products manufactured on or after July 1, 2005 to recognize and give effect to the broadcast flag.

Description: This case represents an attempt by the FCC to establish far-reaching influence concurrent with the nation's upcoming transition from an analog transmission standard to a digital transmission standard, commonly known as digital television ("DTV"). Of specific concern to the Commission is the increased potential for rapid and widespread unauthorized copying and redistribution of digital content that may result due to the widespread switch to DTV.

In response to these concerns, in November 2003, the Commission "adopted regulations aimed at requiring demodulator products manufactured on or after July 1, 2005 to recognize and give effect to the broadcast flag." *In re* Digital Broadcast Content Protection, *Report and Order and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 23,550, 23,570, 23,576, 23,590–91 (Nov. 4, 2003) ("Order"). A broadcast flag, or Redistribution Control Descriptor, is "a digital code embedded in a digital broadcasting stream, which prevents digital television reception equipment from redistributing digital broadcast content." In order to make this content-protective measure effective, the signal must be flagged and the receiver decoding the signal must recognize and give effect to the flag.

The petition for review challenged the FCC's Order on three grounds: "(1) the Commission lacked statutory authority to mandate that demodulator products recognize and give effect to the broadcast flag; (2) the broadcast flag regime impermissibly conflicted with copyright law; and (3) the Commission's decision was arbitrary and capricious for want of reasoned decisionmaking."

As the court noted, it is "axiomatic" that an administrative agency's policy considerations are due deference only when they are reasonably made pursuant to a legislative grant of authority. The court cites to the "familiar" *Chevron/Mead* line of Supreme Court precedent as the source of the standard for judicial review of administrative policy. Short of an exercise of expressly granted statutory authority, the Commission must rely upon its "ancillary jurisdiction." As delineated by three Supreme Court cases—*United States v. S.W. Cable Co.*, 392 U.S. 157 (1968), *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979)—such ancillary jurisdiction can only be invoked by the Commission in a situation where the regulation seeking to be promulgated is under the general grant of jurisdiction under Title I of the Act and is reasonably ancillary to the effective performance of the Commission's various responsibilities as delegated to it by Congress.

The court followed the standard *Chevron/Mead* analysis, stating that the Commission did not rely on its authority under a specific legislative grant of authority. As such, these regulations were adopted pursuant solely to the FCC's ancillary jurisdiction under Title I of the Act.

In exercising this ancillary jurisdiction, the Commission found that

> (1) television receivers are covered by Title I's general jurisdictional grant even when those receivers are not engaged in the process of communication by wire or radio and (2) flag-based regulations are reasonably ancillary to the Commission's regulatory authority to foster a diverse range of broadcast television programs and promote the transition from analog service to DTV.

Despite the FCC's arguments that their broadcast flag regulations were a reasonable application of the agency's ancillary authority under the Communications Act, the court found that they did satisfy an all-important threshold consideration: whether the agency acted pursuant to delegated authority. Under Title I of the Act, and as clarified by the Supreme Court in *Midwest Video*, the Commission has authority to assert jurisdiction over an entity engaged in "communication by wire or radio." The court found that the Commission's general jurisdictional grant under Title I "plainly encompasses the regulation of apparatus that can receive television broadcast content, but only while those apparatus are engaged in the process of receiving a television broadcast . . . [not] after a transmission is complete." The broadcast flag code, the court concluded, only affects the apparatus after the initial transmission is complete, preventing it from being able to retransmit or transfer digital content. Consequently, the broadcast flag regulations fall outside of the authority granted to the Commission by Congress under the Act.

Finally, the court concluded that subsequent legislation "confirms the limited scope of the agency's ancillary jurisdiction and makes it clear that the broadcast flag regulations exceed the agency's delegated authority under the statute."

Summarized by Andrew Smith

APCC Servs., Inc. v. Sprint Commc'ns Co., 418 F.3d 1238 (D.C. Cir. 2005)

Issue: Whether Chapter 5 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151–615b, creates a private right of action for an owner or operator of a payphone service provider to recover from an interexchange carrier the compensation for coinless payphone calls required by a regulation of the Federal Communications Commission ("Commission").

Holding: Although aggregators had standing to sue the defendant interexchange carriers for failing to pay the payphone service providers dial-around compensation—which payphone service providers receive for completed calls that are not paid for by coin—they did not have the right to sue in federal court to recover the compensation. The interexchange carriers' motion to dismiss was granted.

Discussion: APCCS and several other aggregators brought suit on behalf of payphone service providers to recover compensation for dial-around service owed by interexchange carriers pursuant to the Telecommunications Act of 1996 ("Act"). The Act required that payphone service providers be fairly compensated for intrastate and interstate calls made with their payphones pursuant to 47 U.S.C. § 276(b)(1)(A). The defendants, Sprint, AT&T, and other interexchange carriers, moved to dismiss the cases, claiming that the aggregators lacked standing to sue. The district court denied the motion for AT&T and Cable & Wireless, and allowed the plaintiffs to amend their complaints to assert that §§ 201(b), 407, and 416(c) of Title 47 provide alternative grounds for relief. The defendants filed an interlocutory appeal and the U.S. Court of Appeals for the District of Columbia Circuit consolidated the appeals.

The U.S. Court of Appeals for the District of Columbia Circuit considered whether Chapter 5 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-615b, creates a private right of action for an owner or operator of a payphone, a payphone service provider, to recover from an interexchange carrier the compensation for coinless payphone calls required by a regulation of the Federal Communications Commission. The court of appeals held that there is no private right of action of a payphone service provider to recover from an interexchange carrier based on § 276 of the Communications Act. In reaching this conclusion, the court of appeals first considered the issue of whether the plaintiff aggregators had standing to sue on behalf of the payphone service providers. Relying on Federal Rule of Civil Procedure 17(a), the court determined that the assignment of the payphone service providers to the aggregators to sue on their behalf was valid since the assignments could not be revoked without written consent of the aggregator and further held that the assignee's conduct with respect to the recovery is immaterial.

In reaching the issue of whether § 276 of the Telecommunications Act of 1996 creates a private right of action, the court deferred to the decision in *Greene v. Sprint Communications Co.*, 340 F.3d 1047 (9th Cir. 2003), concurring that § 276 does not contain any "rights-creating language" and as a result, interexchange carriers are not regulated by that section and therefore, could not have violated that provision. However, the court held that interexchange carriers violated a regulation issued by the Commission, but did not violate Chapter 5. The court further noted that the Commission never specified an interexchange carrier's failure to compensate payphone service providers for the dial around service as "unjust and unreasonable" pursuant to § 201(b) of the Act in its 1999 Order. In response to plaintiffs' contention that the compensation regulation is an "order" within the meaning of § 416(c), the court held that the order only refers to adjudicatory and not rulemaking decisions. Therefore, plaintiffs were not provided a right to private action via §§ 206 and 207. Relying on the First Circuit decision in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1 (1st Cir. 1984), the court noted that making §§ 407 and 416(c) applicable to Commission regulations would interfere with the Commission's ability to enforce the Communications Act.

Summarized by Behnaz Lavian

***In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), *petition for reh'g en banc denied*, 405 F.3d 17 (D.C. Cir. 2005), *cert. denied sub nom.* Miller v. United States, 125 S. Ct. 2977, 162 L. Ed. 2d 906 (2005)**

Issue: Whether journalists enjoy a testimonial privilege allowing them to refuse to identify a source when subpoenaed to testify before a grand jury.

Holding: Neither the First Amendment nor federal common law provides journalists with the privilege to refuse to identify before a grand jury a source who is, or may be, engaged in criminal activity.

Discussion: Journalists Matt Cooper (along with his employer, Time, Inc.) and Judith Miller were subpoenaed by Special Counsel Patrick J. Fitzgerald regarding contacts they had with a government official concerning the leak of the Central Intelligence Agency operative's identity. They appealed a civil contempt order issued by the district court for refusing to testify before a grand jury and claimed that the identities of their sources are protected by the First Amendment, and in the alternative, a journalists' privilege.

The court of appeals disposed of the First Amendment argument based on *Branzburg v. Hayes*, 408 U.S. 665 (1972). The District of Columbia Circuit refused to revisit the question determining, "Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury . . . ." *Miller*, 397 F.3d at 970.

The court rejected petitioners' claim that the confidentiality of their sources was protected by a journalists' privilege. Petitioners argued such a privilege was consistent with congressional intent, expressed in Federal Rule of Evidence 501, allowing federal courts to recognize new testimonial privileges. The majority opinion then determined, without deciding whether such a privilege existed, that the government in this case had presented enough evidence to overcome any such privilege.

In a concurring opinion, Judge Sentelle found it strange to "reach the quantum question in the absence of a determination as to the existence of the privilege" and reasoned that since *Branzburg* no such federal common law privilege has arisen. *Miller*, 397 F.3d at 977. Judge Henderson, also concurring, felt the court need not decide the existence of a federal privilege, finding that "the Special Counsel's evidentiary proffer overcomes any hurdle, however high." *Miller*, 397 F.3d at 982. The final concurrence by Judge Tatel did recognize a federal common law journalistic privilege although he agreed the Special Counsel had overcome any privilege.

Finally, the court rejected petitioners' two procedural claims, finding (1) ex parte filings by the Special Counsel lawfully maintained the secrecy of grand jury proceedings; and (2) Department of Justice administrative subpoena guidelines explicitly denied creating a legally enforceable right in a third party.

Summarized by Shawn M. McMahon

Northpoint Tech., Ltd. v. FCC, 412 F.3d 145 (D.C. Cir. 2005)

Issue: In 2004, the FCC issued the Auction of Direct Broadcast Satellite Licenses order ("DBS Auction Order"). *In re* Auction of Direct Broadcast Satellite Licenses, *Order*, 19 F.C.C.R. 820 (Jan. 5, 2004). The DBS Auction Order concluded that § 647 of the Open-market Reorganization for the Betterment of International Telecommunications Act ("ORBIT Act") did not prohibit the Federal Communications Commission ("FCC" or "Commission") from auctioning DBS spectrum. Northpoint Technology filed a petition for review with the District of Columbia Circuit Court of Appeals challenging the FCC's interpretation of the ORBIT Act. Section 647 of the ORBIT Act prohibits the FCC from auctioning satellite spectrum that is international in use. The court was asked to review whether the FCC's distinction between international and domestic satellite service in the DBS Auction Order was proper considering it was inconsistent with the Commission's earlier report and order in Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites & Separate International Satellite Systems, *Report and Order*, 11 F.C.C.R. 2429 (Jan. 19, 1996) ("DISCO I").

Holding: The court reviewed the FCC's interpretation under the *Chevron* doctrine and found the FCC's decision arbitrary and capricious. The court held that the FCC's ORBIT Act rulemaking was inconsistent with the FCC's prior ruling on the subject in DISCO I. In DISCO I the FCC trivialized the distinction between international and domestic satellite service. However, in the DBS Auction Order, the Commission assumed that the distinction was severe. The disparity between domestic and international was critical in allowing the FCC to auction DBS spectrum in light of § 647 of the ORBIT Act's prohibition on auctioning satellite spectrum that is for international use. The Commission in the DBS Auction Order gave no explanation for the deviation from its statements on the distinction between international and domestic satellite spectrum use in DISCO I. Therefore, the court vacated part III.A of the DBS Auction Order and remanded to the FCC for further rulemaking.

Discussion: The court began to dance "the *Chevron* two-step" by taking Northpoint's lead on step one and found that the statute clearly forbid the FCC from auctioning all DBS spectrum, both domestic and international. However, the court held that Congress had missed a beat when drafting § 647. The text of § 647 prohibits the FCC from auctioning "spectrum used for the provision of international or global satellite communications service." Since a literal interpretation would precondition the auction prohibition based on the outcome of the auction itself, the court found that the statute's meaning was ambiguous. Finding Congress out-of-tune, the court played on.

The court then took the lead and waltzed Northpoint over to step two of the *Chevron* analysis: determining whether the FCC's interpretation of the ambiguous statute was arbitrary and capricious. Here it found the FCC had lost its rhythm. The Commission had developed a record in its DISCO I rulemaking that suggested the distinction between domestic and international DBS service was not the same tune they were playing now. In interpreting § 647 of the Orbit Act, the FCC claimed that there was a distinction between international and domestic DBS service. Thus it could auction spectrum for domestic DBS service even though it was prohibited from doing so with international DBS service.

The FCC may now regret the decisions made in the DISCO I era (finding the distinction between international and domestic service minimal), but it cannot ignore them. Indeed, for the Commission's interpretation of § 647 to strike the right chord, it must acknowledge DISCO I's findings and explain why DISCO I is dead. While the court believed the FCC's current interpretation of § 647 to have a good beat, it couldn't dance to it. The ORBIT rulemaking's explanation of DISCO I was off-beat; and while DISCO I may have been off-key, that precedent had to be acknowledged and distinguished before the FCC could come to an interpretation of § 647 that allowed it to hold spectrum auctions for DBS.

Summarized by Patrick Murck

United States v. Councilman, 418 F.3d 67 (1st Cir. 2005)

Issue: Whether Bradford Councilman's interception of e-mail messages in temporary, transient electronic storage constitutes an offense under the Wiretap Act, 18 U.S.C. § 2510, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510–2522.

Holding: The court held that the Wiretap Act's electronic communication term does encompass transient electronic storage that is intrinsic to the communication process. Therefore, intercepting e-mail messages that are in the transient state is an offense under the Wiretap Act. The First Circuit found that the district court erred in granting the defendant's motion to dismiss and remanded the case for further proceedings consistent with the First Circuit's opinion.

Discussion: Interloc, Inc., is an online rare book listing service. As vice-president of Interloc, Inc., Bradford C. Councilman managed the company's e-mail service and book dealer subscription list. In January 1998, Councilman's indictment alleges that Councilman instructed Interloc employees to intercept and copy all incoming e-mails to the book dealers from Amazon.com. The Interloc computer system was set up to copy the Amazon.com incoming messages to a separate file for Councilman's access. This process enabled Councilman to read e-mail messages sent to the Interloc subscribers prior to their receipt of the e-mail messages.

Councilman claimed that the system was capturing electronic storage, not electronic communications. Technically speaking, when a subscriber hits the send button on his composed e-mail, the message becomes formatted through a mail transfer agent ("MTA"). The MTA then sends the message to another program that "packetizes" it. From there, the message enters the Internet. In a matter of seconds, this packetized message is sent to many intermediary computers before reaching its final destination. The intermediary computers often keep backup copies if they cannot deliver the packetized message immediately. This system is called "store and forward" delivery.

Councilman argued that Congress defined electronic storage as "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof." United States v. Councilman, 245 F. Supp. 2d 319 (D. Mass. 2003). The district court granted Councilman's motion to dismiss the charge of conspiracy to violate the Wiretap Act, finding that the messages Councilman intercepted were not electronic communications under the Wiretap Act. A divided First Circuit affirmed the lower court's decision, holding that the Wiretap Act's definition of electronic communication does not include electronic storage; therefore, intercepting electronic storage is not a violation of the Wiretap Act. The United States' petition for a rehearing en banc was granted by the full bench of the First Circuit.

The case hinged on the interpretation of the Wiretap Act, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510–2522 ("ECPA"). In determining whether "electronic communication" as broadly defined in the Wiretap Act included "electronic storage," the court first looked to the plain meaning of the statute. The Wiretap Act provides definitions for both "wire communication" and "electronic communication." The former's definition includes electronic storage while the latter's definition does not. However, in promulgating a definition for "electronic communication" in the ECPA, Congress provided four exceptions, of which, electronic storage is not enumerated. The court, in rejecting Councilman's argument that "electronic storage" is an exception, referenced that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."

Unable to discern a judgment from the plain meaning of the statute, the court then looked to the legislative history of the Wiretap Act and the ECPA. The "electronic storage" clause was added to the "wire communication" definition to include voice-mail. The inclusion of "electronic storage" was to put this stored wire communication into the purview of the Wiretap Act, rather than the Stored Communications Act (which protected the backup communications and facilities that housed the backup). 18 U.S.C. §§ 2701–2712. The court further found that when Congress added "electronic storage" to "wire communication" they did not contemplate excluding storage in the definition of "electronic communication."

The court said Congress purposefully defined "electronic communication" in a broad manner to provide remedies for persons whose computers were hacked. The statute was looking to protect the e-mail files that were left behind on a person's computer, in addition to protecting the files for the brief instants when a message becomes stored on intermediary computers en route to its destination. The court found that the legislative history of the Wiretap Act and the ECPA did not indicate any type of exclusionary discussions of storage from the definition of "electronic communication." Therefore, because of the broad "electronic communication" definition in the Wiretap Act as amended by the ECPA, the court ruled that a person who intercepts an e-mail that is in transient electronic storage violates the Wiretap Act.

Summarized by Carol Cahill

Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005)

Issue: Whether an order by the dean of a publicly-funded university that withdraws financial support from a subsidized student newspaper unless all articles are approved in advance of publication violates constitutional rights to free speech guaranteed by the First Amendment; and if so, whether the dean is entitled to qualified immunity for this violation.

Holding: The court applied the *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), framework for free speech analysis to evaluate whether regulation of collegiate speech is permitted. It determined that the articles in the *Innovator* were made by speakers in a public forum, and it is unconstitutional for public officials to censor speech in a designated public forum. Then the court, sitting en banc, reversed its prior decision and held that the dean was entitled to qualified immunity.

Discussion: The *Innovator* is the subsidized student newspaper of Governors State University, located in Illinois. The newspaper is published by a Board which consists of four students, two faculty members, and one employee of the university. The Board's policy is that each funded publication "will determine content and format . . . without censorship or advance approval."

Nonetheless, Dean of Student Affairs and Services, Patricia Carter, required such approval after the *Innovator* published several articles attacking the integrity of specific members of the administration. As a result of Carter's order, the *Innovator* ceased publication in November 2000. This civil action for deprivation of rights was brought by members of the editorial staff, and the dean appeals from a prior ruling of this court which determined that she did not have protection from liability under qualified immunity.

In determining whether the dean's order violated free speech rights, the court applied the legal framework from *Hazelwood*, which held that faculty may supervise and determine the content of a high school student newspaper based on "legitimate pedagogical concerns." Whereas the district court held that this decision is limited to high school students, this court held that *Hazelwood's* framework "applies to subsidized student newspapers at colleges as well as elementary and secondary schools." As in a high school setting, the court held officials are justified in reviewing the content of a subsidized student newspaper in a collegiate setting because of the desire to "ensure high standards for the student speech that is disseminated under [the school's] auspices."

Hazelwood also distinguishes between speech in a public forum and speech in a non-public forum to address the question of whether plaintiffs have asserted a legitimate constitutional claim. Though speech in a non-public forum "may be open to reasonable regulation even at the college level—or later," if the university newspaper created a public forum for the reporter's speech, then public officials are precluded from censoring that speech. Although the *Innovator* did not participate in a "traditional public forum," the university created a medium of "designated public forum" or "limited purpose public forum" when it established a subsidized student newspaper under the Board. Taking the facts in the light most favorable to the plaintiffs, the court determined that the dean's conduct violated rights to free speech.

When evidence presented to the court makes out a constitutional claim, the court must then inquire whether the official enjoys qualified immunity for such a violation. Qualified immunity shields an official from suit whenever he or she "reasonably misapprehends the law governing the circumstances" at issue. This protection extends to decisions that are "constitutionally deficient." Prior to this court's application of the *Hazelwood* framework to a university setting, the law governing review and approval of collegiate speech by university officials was not clearly established. Thus, the court found it "inappropriate to say" that a reasonable person in Dean Carter's position in November 2000 would definitely have known that the order to the *Innovator* to submit issues for review or have financial support cut off violated the First Amendment. Dean Carter was entitled to qualified immunity, and was protected from liability in damages.

Though the *Innovator* enjoyed free speech by virtue of its participation in a public forum, this court's application of the *Hazelwood* legal framework to a university setting has the potential to restrict First Amendment protection in venues of collegiate speech found elsewhere. The dynamic of this potential issue is first evident in the majority opinion: "Academic freedom includes the authority of the university to manage an academic community . . . free from interference by . . . the courts." The dissent counters: "Restrictions on free speech have no place in the world of college and graduate school," calling the college classroom the "marketplace of ideas."

Having determined that the *Innovator* participated in a public forum, the court found that Dean Carter violated the First Amendment by withholding printing funds for the paper if its articles had not been approved in advance. Because the law on the issue of freedom of collegiate speech was unsettled, Dean Carter was entitled to qualified immunity. The prior decision of the court of appeals was reversed.

Summarized by Chris Nolin

Davidson & Assocs. v. Jung, 422 F.3d 630 (8th Cir. 2005)

Issue: An appeal from the U.S. District Court for the Eastern District of Missouri presented several issues: whether the state law claims for breach of contract were preempted by the federal Copyright Act; whether the use of reverse engineering constituted a violation of the Digital Millennium Copyright Act ("DMCA"); and whether the interoperability exception to the DMCA applies to the circumvention technology at issue in this case.

Holding: The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's grant of summary judgment in favor of the plaintiff and found: the Copyright Act did not preempt the plaintiff's state law breach of contract claims; the defendants' reverse engineering violated both the anti-circumvention and anti-trafficking provisions of the DMCA; and the interoperability exception to the DMCA was not applicable.

Discussion: The plaintiff, Davidson & Associates, doing business as Blizzard Entertainment ("Blizzard"), creates and distributes gaming software for use on personal computers. Using reverse engineering, the defendants created a program that enabled its users to circumvent Blizzard's piracy prevention controls. Users of the defendants' program, which was available on the defendants' website, were able to experience certain aspects of Blizzard games otherwise only available to purchasers of the games from Blizzard. The plaintiff filed claims against the defendants for breach of contract, circumvention of copyright protection system, and trafficking in circumvention technology.

On appeal, the defendants argued that breach of contract claims were preempted by the federal Copyright Act. The case concerned conflict preemption, which applies when it is impossible to comply with both the state and federal law or when the state law frustrates the purposes of the federal law. The Copyright Act allows owners of computer programs to make adaptations to the program for interoperability purposes. Defendants argued that state law, which allows parties to waive their rights to adapt programs, conflicts with the federal law. The court of appeals disagreed, and held that there was no preemption. Citing other cases, the court ruled that the Copyright Act does not preempt a breach of contract action based on prohibited acts contained in a licensing agreement. In this case, the defendants had agreed to both the Terms of Use and End User Licensing Agreements, and thereby relinquished their rights to reverse engineer.

Next, the court considered the claims that the reverse engineering violated provisions in the DMCA. The anti-circumvention provision of the act prohibits a person from "circumvent[ing] a technological measure that effectively controls access to a work protected under [copyright law]." 17 U.S.C. § 1201(a)(1) (2000). The anti-trafficking provisions of the act focuses on the trafficking in of circumvention technology. *Id.* §§ 1201(a)(2), (b)(1). The court of appeals held that the defendants had violated all three provisions.

Finally, the court considered the defendants' argument that the interoperability exception to the DMCA applied. One of the exceptions to the DMCA's prohibition of the use of circumvention technology is for those who use such technology "for the sole purpose" of trying to achieve interoperability of computer programs through reverse engineering. *Id.* § 1201(f). In order to use the interoperability defense, one must show that (1) they lawfully obtained the right to use a copy of the computer program; (2) the person engaging in the circumvention did not previously have the information gathered through the reverse engineering process; (3) the sole purpose of the reverse engineering was to achieve interoperability between the circumvented program and other programs; and (4) the circumvention did not constitute infringement. *Id.* The court of appeals found that the defendants' circumvention constituted infringement, and therefore the interoperability defense did not apply to them. As a result, summary judgment in favor of Blizzard was proper.

Summarized by Tracy DeJesus

Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc., 423 F.3d 1056 (9th Cir. 2005)

Issue: Whether a payphone service provider ("PSP") may sue a long-distance carrier to recover compensation for "dial-around" coinless calls that the Federal Communications Commission's ("FCC") regulations obligate the long-distance carrier to pay.

Holding: The court held that a PSP may sue a long-distance carrier to recover compensation for calls that FCC regulations obligate the carrier to pay.

Discussion: In its ruling, the court reversed an earlier Ninth Circuit decision, *Greene v. Sprint Communications Co.*, 340 F.3d 1047 (9th Cir. 2003), in which it held that a PSP may not sue long-distance carriers for dial-around compensation under a provision of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("Act"). However, since *Greene*, the FCC has interpreted § 201(b) of the Act to allow PSPs to proceed with such actions against long-distance carriers. In light of this development, the court deferred to the FCC's "reasonable, authoritative interpretation of that statute."

Under *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984), courts engage in a two-step analysis in order to determine the level of deference to give to an agency's interpretation of a statute. First, if the statute unambiguously expresses the intent of Congress, then the courts are bound to give effect to the clearly stated congressional intent. If congressional intent is ambiguous, a court proceeds to step two of the *Chevron* analysis and will defer to an agency's interpretation so long as the agency's statutory construction is "a reasonable policy choice to make" and not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 845. Pursuant to § 201(b), the FCC may engage in rulemaking to address industry practices that are "unjust or unreasonable." In its analysis of § 201(b), the court determined that congressional intent regarding what practices were deemed "unjust or unreasonable" was ambiguous and, thus, step two of the *Chevron* analysis was necessary. Under step two, the court determined that the FCC's rule—that failure to pay a PSP dial-around compensation was unjust—was a reasonable interpretation of § 201(b). Further, the court determined the FCC's interpretation that Congress intended for private actions to be available to remedy such violations was also a reasonable, authoritative interpretation of § 201(b).

Summarized by James Weiss

Recording Indus. Ass'n of Am. v. Univ. of N.C. at Chapel Hill, 367 F. Supp. 2d 945 (M.D.N.C. 2005)

Issue: Whether, pursuant to the Digital Millennium Copyright Act ("DMCA"), subpoenas obtained by the Recording Industry Association of America ("RIAA") forcing two universities to identify two copyright infringing individuals who accessed the Internet through the universities' networks are valid.

Holding: Section 512(h) of the DMCA did not authorize the issuance of subpoenas to two universities acting as Internet Service Providers ("ISPs") when those universities acted only as conduits for the transmission of infringing materials. Additionally, the court, relying heavily upon the District of Columbia Circuit's 2003 holding in *Recording Industry Ass'n of America, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), interpreted the subpoena issuance language of § 512(h) to require the issuance of the subpoena to be from the jurisdiction in which the alleged violation occurred.

Description: Pursuant to the DMCA, the RIAA served subpoenas on the University of North Carolina at Chapel Hill ("UNC") and North Carolina State University ("NC State"), to identify individuals who were using their networks to infringe copyrights of the association's members. The two unnamed individuals identified in the subpoenas intervened, as John Doe and Jane Doe, and moved to quash the subpoenas. After initially cooperating with the RIAA, the universities filed their own motions to quash. With the constitutionality and applicability of the DMCA directly challenged, the U.S. government intervened as well. The court, having received all motions, granted John Doe and Jane Doe's motions to quash the subpoenas.

Interveners presented statutory, procedural, and constitutional arguments in favor of their motions to quash. Because the court found the intervener's statutory and procedural arguments dispositive, no ruling on the constitutionality of the DMCA was necessary.

First, interveners argued that § 512(h) of the DMCA did not authorize the issuance of subpoenas to ISPs that functioned "solely as a conduit for communications." The court's statutory reading turned on whether a party alleging infringement must first notify the ISP of such activity before resorting to a subpoena. The RIAA, responding to the Does' statutory interpretation arguments, urged the court to look beyond a plain reading of the statute and consider Congress' intention to curtail copyright infringement over the Internet. The court, however, was unmoved by the RIAA's exhortations and felt guided by the District of Columbia Circuit's recent holding in *Recording Industry Ass'n of America*. In that case, the District of Columbia Circuit interpreted the same section of the DMCA to require an ISP's notification of infringing activity on its servers before a subpoena ordering identification of infringing parties could be issued. Unlike the court in *Recording Industry Ass'n of America*, this court did not reach the issue as to whether notification was practically possible, given the transitory nature of infringement, because no notification was ever sought in this case.

Second, the court felt it necessary to touch upon intervener Jane Doe's argument that the court's issuance of a subpoena as applied to her was improper on jurisdictional grounds. Ms. Doe was alleged to have infringed copyright while at N.C. State, which is located in the Eastern District of North Carolina, not the Middle District. An issue of first impression as to the DMCA, the court was asked to determine whether § 512(h) allows for the issuance of a subpoena by any district court on any person within the United States, regardless of venue. Intervener argued that the 28 U.S.C. § 1391 was controlling. Section 512(h) reads, in relevant part, that any copyright holder or agent "may request the clerk of any United States district court to issue a subpoena." Looking to the Supreme Court's holding in *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), the court distinguished between nationwide service of process and the issues of jurisdiction and venue. Seeing in § 512(h) no explicit grant of subpoena authority, regardless of venue, the court noted, "[B]ecause of the potential for misuse, it is unlikely Congress would have granted such sweeping jurisdiction without discussion." Thus, the court held the issuance of a subpoena against Ms. Doe invalid based on jurisdictional grounds.

Summarized by Michael Mullin